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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGELICA V., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY et al.,

Plaintiffs and Appellants,

v.

YVONNE Q. et al.,

Defendants and Respondents.

D053225

(Super. Ct. No. J515671B)

APPEAL from an order of the Superior Court of San Diego County, George W.
Clarke, Judge. Reversed with directions.

The San Diego County Health and Human Services Agency (the Agency) and the
minor, Angelica V., appeal an order designating long-term foster care as the permanent
placement for Angelica on the basis of a finding that the beneficial parent-child
relationship exception to termination of parental rights and adoption of Welfare and

Institutions Code section 366.26, subdivision (c)(1)(B)(i) applied in this case. (Statutory references are to the Welfare and Institutions Code.) The Agency and Angelica contend the finding was not supported by substantial evidence. They argue the court misplaced the burden of proof by requiring the Agency to prove the exception did not exist and incorrectly balanced the competing interests in the case. We reverse and direct the juvenile court to vacate its finding that the exception of section 366.26, subdivision (c)(1)(B)(i) applied and to enter a new order terminating parental rights and designating adoption as the permanent plan.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2005 the Agency petitioned on behalf of infant Angelica under section 300, subdivision (j), alleging her mother, Yvonne Q., had subjected Angelica's one-year-old half sister, B.C., to serious physical harm, including biting her when she cried, leaving 13 bite marks and assorted bruises on B.C.'s body and not complying with the reunification plan regarding B.C. Angelica was detained. In November the court found the allegations of the petition true, declared Angelica a dependent child of the court, placed her in foster care and ordered reunification services.

Yvonne's services included visitation with Angelica. After a time, the visits progressed from supervised to unsupervised visits. The social worker expressed concern that Angelica at times returned from unsupervised visits with scratches and bumps and bruises and sometimes she was crying and inconsolable. Also, the social worker reported Yvonne was no longer attending a substance abuse program.

At the 18-month review hearing on June 8, 2007, the court found reasonable services had been offered or provided, but the parents had not made substantive progress. It terminated services and set a section 366.26 hearing.

Subsequently, Yvonne was arrested. She had been a passenger in a stolen car driven by Angelica's father, who was a parolee at large. B.C., who earlier had been returned to Yvonne's care, was in the car when they were apprehended. The court ordered Yvonne's visits with Angelica be supervised.

The social worker opined Angelica was highly adoptable and recommended terminating parental rights. Angelica had never lived with her parents. She was young, smart, attractive and in good health. A maternal great-aunt expressed interest in adopting her, but then decided against it. Later, other relatives stepped forward to be considered for placement. In addition, there were numerous approved prospective adoptive families interested in adopting a child like Angelica.

The social worker described two supervised visits between Angelica and Yvonne at the detention facility where Yvonne was incarcerated. Angelica went willingly to Yvonne, they interacted appropriately and Angelica separated easily from her at the end of each visit. Supervised visits after Yvonne's release from custody were similar. The social worker opined there was not a mother-daughter bond between Yvonne and Angelica that would outweigh the benefits to Angelica of adoption.

At the section 366.26 hearing on March 7, 2008, the social worker testified that, although Yvonne and Angelica had a pleasant relationship that approached a parent-child relationship, Angelica had never lived with Yvonne and saw her foster parents as the

parental figures in her life because they were the ones who cared for her on a daily basis. Angelica was happy to see Yvonne during visits, but had no problem separating from her when visits ended.

Yvonne testified about unsupervised visits she had had with Angelica before her incarceration. She said she had cared for Angelica, fed and bathed her and dealt with her tantrums. She said when her visits again were supervised, Angelica greeted her, called her mommy and ran to her arms. She approved of Angelica's possible placement with a paternal aunt.

After considering the evidence, the court found Angelica was clearly adoptable. It also found there was a parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(B)(i). It stated, "I am not convinced by clear and convincing evidence that the parent-child relationship does not exist such that Angelica wouldn't be substantially harmed." The court found adoption was not in Angelica's best interests and continued the matter for the Agency to provide additional recommendations.

The Agency reported the paternal aunt would not consider guardianship and had decided not to become Angelica's permanent caregiver. The Agency continued to advocate for termination of parental rights so Angelica could be adopted. At a subsequent hearing, the court requested the Agency prepare an additional report and continued the hearing.

At the following hearing, the court again found by clear and convincing evidence that Angelica was adoptable and the beneficial parent-child relationship exception

applied. It found that at the present time there was not a prospective legal guardian and designated long-term foster care as the permanent plan.

DISCUSSION

The Agency and Angelica contend the court's finding the beneficial parent-child relationship exception applied in this case was not supported by substantial evidence. They argue the court misplaced the burden of proof by requiring the Agency to prove the exception did not apply, the court appeared to be confused as to how to balance the competing interests and it did not understand the value that should be attributed to the benefits of adoption.

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)). If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental rights would be detrimental to the child because of a specified statutory exception to termination of parental rights and adoption. (*Id.* at p. 574.) Under the exception found in section 366.26, subdivision (c)(1)(B)(i), the parent is required to show that termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the] exception."

In reviewing whether there is sufficient evidence to support the trial court's finding, the appellate court reviews the evidence in the light most favorable to the court's

order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Once the court made the finding that that Angelica was adoptable, it was Yvonne's burden to show termination of parental rights would be detrimental to Angelica because of a specified statutory exception to termination of parental rights and adoption. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.) The court's comment, "I am not convinced by clear and convincing evidence that that parent-child relationship does not exist such that Angelica wouldn't be substantially harmed," indicates the court may not have understood it was Yvonne's burden to demonstrate the exception applied, and not the Agency's burden to show the exception was not present. In any event, substantial evidence was not presented to meet the requirements of the exception.

Yvonne showed the first prong of the beneficial parent-child relationship exception because she maintained regular visitation and contact with Angelica. However, she did not show the second prong of the exception. In *Autumn H.*, this court explained that when determining whether the exception is present, the juvenile court must balance the parent-child relationship against the benefits the child would gain from the permanence of adoption by a new adoptive family. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The court stated:

"[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

There was not substantial evidence presented to show the benefits of Angelica's relationship with Yvonne were more beneficial to Angelica than the stability and permanency of an adoptive home. Yvonne did not show she had a relationship with Angelica that was parental in nature. Instead, she was a pleasant visitor who played with Angelica during visits. The social worker who had observed their visits stated the visits appeared enjoyable for both Angelica and Yvonne, but when visits ended, Angelica separated from Yvonne easily with no concern. The social worker stated the relationship "approaches parental," but it was not a true parent-child relationship. Angelica saw her foster parents as her parents and called them "Mama" and "Poppy." They provided Angelica with daily care and fulfilled the parental role, not Yvonne. Yvonne did not show a parent-child relationship.

Yvonne also did not show that she and Angelica shared a substantial positive emotional attachment. The supervisor at the visitation facility said that Angelica did not react to seeing Yvonne as a young child would usually react to seeing a parent with whom she was highly bonded. The supervisor said Angelica never mentioned Yvonne to her. She referred to one occasion when Angelica appeared confused when she saw Yvonne, and then looked back at the visitation supervisor, who urged Angelica to go to Yvonne by telling her it was okay. At another visit, Angelica responded to Yvonne's attempt to hug her by lifting one of her arms to block Yvonne and twisting off her lap. At an additional visit, Angelica appeared to interact in a similar manner to all of the adults in the visitation room, not focusing on Yvonne or singling her out as more important than

the other individuals. Also, when Angelica looked at a picture of several women, she did not differentiate between Yvonne and the other women in the picture, referring to each of them as a woman. This evidence shows Angelica saw Yvonne as a friendly visitor, not someone with whom she shared a significant, positive emotional attachment.

Further, Yvonne did not present evidence to show Angelica would be greatly harmed by termination of parental rights. Instead, strong evidence showed the benefits of adoption would greatly outweigh any detriment to Angelica that could occur from severing the parent-child relationship.

At the time of the court's decision, Angelica was not yet three years old. No one had come forward as a potential guardian for her. She faced a future of, at best, being in a guardianship, which is not as secure and permanent as adoption, or, less desirable, facing her youth as a foster child. Yvonne did not present evidence to show great harm to Angelica from terminating their relationship. The social worker stated the loss to Angelica of not seeing Yvonne was not likely to be greatly damaging to her sense of security. The social worker wrote there was not a "solid parental mother-daughter bond that would outweigh the benefits that a permanent adoptive placement could provide"

Substantial evidence was not presented to support the court's decision that the beneficial parent-child relationship applied in this case.

DISPOSITION

The order designating long-term foster care as the permanent plan is reversed. The juvenile court is directed to vacate its finding that the beneficial parent-child

relationship exception to termination of parental rights and adoption of section 366.26, subdivision (c)(1)(B)(i) applied and to enter a new order terminating parental rights and designating adoption as the permanent plan.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.